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In The
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,

v.

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN); and JENNIFER GRANHOLM, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT UNIVERSITIES' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth and Ninth Circuits are split as to whether a public interest group involved in the enactment of a ballot measure, after such measure has passed and has become valid law, maintains an "interest" under Fed. R. Civ. P. 24(a)(2) in a suit challenging the new law on substantive, as opposed to procedural, grounds.

2. Whether the District Court's decision would stand even if the Petitioners' legal interests are substantial.

PARTIES TO THE PROCEEDINGS

Respondent Universities include the following: Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University (collectively, the "Universities").

The Universities accept the Petitioners' statement regarding the parties to the proceedings in all other respects.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

A. Michigan Enacts Proposal 2 Amid Controversy 2

B. Organizations and Individuals Challenge Proposal 2 in Federal Court 3

C. Petitioners and Others Seek to Intervene .. 4

D. The District Court Denies the Motions to Intervene on Multiple Grounds 5

E. The Sixth Circuit Denies the Petitioners' Appeal 6

F. Proposal 2 In Effect 7

ARGUMENT 8

A. No Relevant Split Exists Between the Sixth and Ninth Circuit Standards Regarding What Constitutes an "Interest" Under Fed. R. Civ. P. 24(a)(2) 8

B. The District Court's Decision Would Be Affirmed Regardless of Whether Petitioners' Legal Interests Were Substantial 12

1. Petitioners' Motions to Intervene Were Untimely 12

2. Petitioners' Motions to Intervene Were Properly Denied Based on a Finding that Their Interests Were Adequately Represented 14

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Cases

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 15

Bradley v. Milliken,
828 F.2d 1186 (6th Cir. 1987) 15

Butler, Fitzgerald & Potter v. Sequa Corp.,
250 F.3d 171 (2d Cir. 2001) 15

Coalition to Defend Affirmative Action v. Granholm,
473 F.3d 237 (6th Cir. 2006) 6

Coalition to Defend Affirmative Action v. Regents of the University of Michigan,
539 F. Supp. 2d 924 (E.D. Mich. 2008) 6, 7, 8, 15

Coalition to Defend Affirmative Action v. Regents of the University of Michigan,
539 F. Supp. 2d 960 (E.D. Mich. 2008) 7

Idaho Farm Bureau Federation v. Babbitt,
58 F.3d 1392 (9th Cir. 1995) 8, 9, 10

Idaho v. Freeman,
625 F.2d 886 (9th Cir. 1980) 9, 10

Moosehead San. Dist. v. S.G. Phillips Corp.,
610 F.2d 49 (1st Cir. 1979) 15

NAACP v. New York,
413 U.S. 345 (1973) 12

Northland Family Planning v. Cox,
487 F.3d 323 (6th Cir. 2007) 9, 10

Operation King's Dream v. Connerly,
501 F.3d 584 (6th Cir. 2007) 1, 3, 11

Operation King's Dream v. Connerly,
2006 WL 2514115 (E.D. Mich. 2006) 2

Sagebrush Rebellion v. Wyatt,
713 F.2d 525 (9th Cir. 1983) 9, 10

United States v. City of Miami,
278 F.3d 1174 (11th Cir. 2002) 15

United States v. Am. Tel. & Tel. Co.,
714 F.2d 178 (D.C. Cir. 1983) 12, 13

Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman,
684 F.2d 627 (9th Cir. 1982) 11

Michigan Constitution

Mich. Const. art. I, § 26 2

Rules of Court

Fed. R. Civ. P. 24 ..... 1, 5, 8

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Universities respectfully submit this brief in opposition to a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Universities accept the Petitioners' statement regarding the opinions below.

JURISDICTION

The Universities accept the jurisdictional statement of Petitioners.

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, Rule 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

STATEMENT OF THE CASE

A. Michigan Enacts Proposal 2 Amid Controversy

Michigan voters passed Proposal 2, a ballot initiative, on November 7, 2006, amending the Michigan Constitution. The amendment bans "preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const., art. 1, § 26. In the prelude to the 2006 election, however, the activities of Petitioner Michigan Civil Rights Initiative Committee (MCRIC) in promoting Proposal 2 stirred controversy and spawned legal challenges.

Lower federal courts have found MCRIC was successful in putting Proposal 2 on the ballot "through methods that undermine the integrity and fairness of our democratic processes." *Operation King's Dream v. Connerly*, 501 F.3d 584, 591 (6th Cir. 2007). Specifically, the United States District Court for the Eastern District of Michigan found that "'MCRI and its circulators engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action.'" *Id.* at 589 (quoting *Operation King's Dream v. Connerly*, 2006 WL 2514115, at *11-12 (E.D. Mich. 2006)). Despite the fact that "the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception," the Sixth Circuit concluded that the MCRIC's pre-ballot maneuvers could not invalidate

election results after the fact. *Operation King's Dream*, 501 F.3d at 591.

B. Organizations and Individuals Challenge Proposal 2 in Federal Court

On November 8, 2006, the day after Proposal 2 was passed but before it was scheduled to go into effect, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary (BAMN), as well as other groups and individuals, filed suit against Michigan Governor Jennifer Granholm and several universities: the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University. BAMN sought a declaratory judgment that the constitutional amendment violated various federal laws. App. A-9. BAMN also sought a permanent injunction to prevent enforcement of the new law. *Id.*

On December 11, 2006, the Universities filed a cross-claim against Governor Granholm for a preliminary injunction that would allow them to use their existing admissions and financial aid policies through the end of the 2007 admissions cycle. *Id.* On December 14, 2006, Michigan Attorney General Michael Cox filed a motion to intervene coupled with a motion for expedited consideration. App. B-4. The District Court granted both of the Attorney General's motions on December 14. *Id.*

On December 18, 2006, the parties to the action – Plaintiffs, the Universities, the Governor and the Attorney General – filed a stipulation with the District

Court. App. B-5. According to the stipulation, the new constitutional amendment was enjoined as to the Universities through July 1, 2007, which marked the end of the Universities' pending admissions and financial aid cycles. *Id.* The parties also stipulated that the Universities' cross-claim would be dismissed in its entirety. *Id.* The next day, the District Court entered an Amended Order Granting Temporary Injunction and Dismissing Cross-Claim.

C. Petitioners and Others Seek to Intervene

Three additional groups, a city and an individual, Eric Russell, also sought to intervene during a brief, hectic period in December of 2006. On December 14, MCRIC and the American Civil Rights Foundation (ACRF) filed a motion to intervene coupled with a motion to dismiss. App. B-5. Plaintiffs then filed an amended complaint on December 17. Neither MCRIC nor ACRF filed a motion for immediate consideration at that time. *Id.*

On December 18, Towards a Fair Michigan (TAFM), the City of Lansing, and Eric Russell, a white applicant to the University of Michigan Law School, moved to intervene as well. App. B-5-6. On December 19, TAFM and ACRF filed motions to expedite the hearings on their intervention motions, and the City of Lansing filed a supplemental emergency motion to intervene. App. B-6.

D. The District Court Denies the Motions to Intervene on Multiple Grounds

In a ruling on December 27, 2006, the District Court granted Russell's motion to intervene, but denied the motions for MCRIC, TAFM, ACRF, and the City of Lansing to intervene, on multiple grounds. App. B-12-21. With regard to its denial of those motions made pursuant to Fed. R. Civ. P. 24(a), the District Court held: (1) the motions were not timely; (2) the proposed intervenors had no substantial legal interest in the action; (3) the proposed intervenors' interests would not be impaired in the absence of intervention; and (4) the parties before the court would adequately represent the proposed intervenors' interests. *Id.*

The District Court's reasons for denying intervention rested on factual findings made by the court. For instance, with regard to whether the proposed intervenors would be adequately represented, the District Court stated that there was "no proof in this record that the proposed intervenors or their lawyers would be more capable than the elected attorney general of mounting a defense to the amendment, or that their arguments would be more compelling or credible or better founded." App. B-18. The court noted that "the Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage," even while the Governor "made

public statements calling for the rejection of Proposal 2 prior to election day. . . ." App. B-17.[1]

E. The Sixth Circuit Denies the Petitioners' Appeal

On September 6, 2007, the United States Court of Appeals for the Sixth Circuit denied Petitioners' Appeal of the District Court's decision regarding intervention. App. A-21-22. The Sixth Circuit based its holding on Petitioners' lack of any substantial legal interest in the subject matter of the case and therefore declined to address the remaining factors necessary for intervention of right. The Sixth Circuit also affirmed the District Court's denial of permissive intervention.

F. Proposal 2 In Effect

The day after the District Court granted his motion to intervene, Russell filed an Emergency Motion for a Stay Pending Appeal. The Sixth Circuit granted the stay on December 29, 2006. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006). As a result, Proposal 2 went into effect with respect to the Universities as of that date. After consolidating the case with another, related case, the District Court dismissed the Plaintiffs' challenges to Proposal 2 by opinions and orders dated March 18, 2008. *Coalition to Defend Affirmative Action v.*

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[1] Respondent Universities object to Petitioners' Statement of the Case to the extent it presents factual evidence that contradicts or supplements the District Court's factual findings in deciding Petitioner's motion to intervene.

Regents of the University of Michigan, 539 F. Supp. 2d 924, 930 (E.D. Mich. 2008); *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d 960, 964 (E.D. Mich. 2008) (resolving various outstanding motions).[2]

At the heart of the District Court's decision was its granting of the Michigan Attorney General's motion for summary judgment with respect to the Plaintiffs' constitutional challenges to Proposal 2. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 944-60. Just four days before the District Court's decision, MCRIC and ACRF had filed their Petition for a Writ of Certiorari in this Court, arguing, *inter alia*, that their interests were not adequately represented by Michigan's Attorney General. Petitioners' Brief at 17-24.

After the dismissal of the Coalition and Cantrell Plaintiffs' cases, the Cantrell Plaintiffs filed a motion to amend/alter the judgment of the District Court. The Coalition Plaintiffs, Eric Russell and the Universities appealed the Opinion and Order of the District Court

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[2] On January 5, 2007, the District Court consolidated the Coalition Plaintiffs' case with that of the Cantrell Plaintiffs, who were challenging Proposal 2 under a different constitutional theory. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 932. The Universities are defendants only as to the Coalition Plaintiffs.

to the Sixth Circuit.[3] Proposal 2 remains in effect today.

ARGUMENT

A. No Relevant Split Exists Between the Sixth and Ninth Circuit Standards Regarding What Constitutes an "Interest" Under Fed. R. Civ. P. 24(a)(2)

Petitioners claim that a circuit split exists between the Sixth and Ninth Circuits with regard to intervention of right. In actuality, the Sixth and Ninth Circuits apply the same basic factors to determine whether intervention of right is warranted. Moreover, there is no indication that the Ninth Circuit would apply the "interest" factor of that analysis any differently to the present facts than did the Sixth Circuit.

The elements required for intervention of right, which track closely the language of Fed. R. Civ. P. 24(a), remain fairly uniform across the circuit courts. A proposed intervenor must establish the following: (1) that the motion to intervene was timely; (2) that the intervenor has a substantial legal interest in the subject matter of the case; (3) that its ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before

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[3] After the Coalition Plaintiffs appealed the dismissal to the Sixth Circuit, the Universities cross-appealed the same decision's denial of the Universities' motion to dismiss the Universities as parties. *Coalition to Defend Affirmative Action*, 539 F. Supp. 2d at 940-45.

the court may not adequately represent its interest. *Northland Family Planning v. Cox*, 487 F.3d 323, 345-46 (6th Cir. 2007); *accord Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). The central issue raised by Petitioners' brief is the requirement that one seeking to intervene of right have an interest in the subject matter of the case.

In both the Sixth and Ninth Circuits, a public interest group may be found to have a substantial legal interest in a measure that it sponsored when the resulting law is later challenged on procedural grounds. *Northland Family Planning*, 487 F.3d at 345-46 (noting that had the public interest group "sought to intervene in a suit challenging the legislative process by which the statute was enacted, its legal interest would be significantly stronger due to its involvement in the passage of the Act"); *Idaho Farm Bureau Federation*, 58 F.3d at 1395 (9th Cir. 1995); *Sagebrush Rebellion v. Wyatt*, 713 F.2d 525, 526 (9th Cir. 1983); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980).

The Sixth Circuit has addressed an entirely different situation with recent precedent, namely the situation where such a law, after its enactment, is challenged on *substantive* grounds. *Northland Family Planning*, 487 F.3d at 345. In those situations, the Sixth Circuit has held that the public interest group has no substantial legal interest after the measure becomes law. *Id.* Petitioners have pointed to no Ninth Circuit case that conflicts with the Sixth Circuit's stance on the ability of public interest groups to intervene in *substantive* challenges to already-enacted laws.

Three of the four Ninth Circuit cases cited by Petitioners as purported evidence of a circuit split analyze intervention in the context of a procedural challenge, not a substantive one.[4] *Idaho Farm Bureau Federation*, 58 F.3d at 1395 (relating to suit to "set[] aside the final rule" listing animal as endangered species "because the [government agency] committed several procedural errors during the period between the initial proposal and the final listing"); *Sagebrush Rebellion*, 713 F.2d at 526 (noting that lawsuit "challeng[ed] the legality of actions taken by former [government official] when he recommended the creation of a . . . Conservation Area . . . and then, by public order . . . withdrew . . . land in the proposed conservation area from selection and entry under the Desert Land Act"); *Idaho v. Freeman*, 625 F.2d at 887 (dealing with "suit challenging procedures for ratification of the proposed Equal Rights Amendment . . .").

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[4] The Sixth Circuit found this substantive/procedural distinction to be vital to its recent opinion in *Northland Family Planning*, 487 F.3d at 345, which relied on that point to distinguish many of the same Ninth Circuit cases now invoked by Petitioners:

> We find this distinction to be compelling, as the public at large – including public interest groups – has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant.

Only one case cited by Petitioners, *Spellman*, involved a substantive challenge. *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982). The Ninth Circuit's language in *Spellman* in favor of intervention, however, was pure *dicta*. "[W]hile we sustain [the public interest group's] appeal [with regard to invervention]," stated the court, "this reversal does not require a new trial because the holding of the case would not be changed." *Id.* In *Spellman*, the public interest group "was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered." *Id.* The Ninth Circuit's finding in *Spellman* that the public interest group should have been granted intervention was immaterial to its ultimate disposition. *See id.* (affirming decision of district court regarding summary judgment despite reversal on intervention issue).

Since the case at hand presents a substantive challenge to Michigan's Constitution, the Ninth Circuit precedent cited by Petitioners does not conflict with the Sixth Circuit's ruling. Others have already waged a procedural challenge to the enactment of Proposal 2, which challenge was ultimately denied. *Operation King's Dream*, 501 F.3d at 591. Consistent with what the Sixth and Ninth Circuits might require, Petitioner MCRIC participated fully in that litigation. *Id.*

B. The District Court's Decision Would Be Affirmed Regardless of Whether Petitioners' Legal Interests Were Substantial

In the decision below, the Sixth Circuit affirmed the District Court's opinion based on only one of the District Court's multiple grounds for denying intervention to Petitioners. App. A-13. In addition to finding that Petitioners had no substantial legal interest, discussed *supra*, the District Court also found that Petitioners' motions for intervention were untimely, and that their interests were adequately represented by existing parties to the action. App. B-11-21. Even if the Sixth Circuit had found that Petitioners had a substantial legal interest, it could have affirmed the District Court opinion on one or both of the remaining grounds and similarly denied intervention of right.

1. Petitioners' Motions to Intervene Were Untimely

A district court's finding regarding the timeliness of a Fed. R. Civ. P. 24(a) motion is reviewed for abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973), *superseded on other grounds*, *United States v. Am. Tel. & Tel. Co.*, 714 F.2d 178 (D.C. Cir. 1983). This Court has described precisely how to evaluate the timeliness of a motion to intervene:

> If it is untimely, intervention must be denied. . . . Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive.

> Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id.

The District Court found Petitioners' motions for intervention untimely. App. B-11-12. As noted by the District Court, Petitioners waited over a month after the filing of the highly publicized lawsuit before they moved to intervene. App. B-12. As noted *supra*, neither Petitioner asked for expedited treatment of their motion to intervene until *after* the parties had reached a stipulation on matters central to the case. Michigan's Attorney General, on the other hand, requested expedited treatment at the same time his motion for intervention was filed. App. B-4.

In light of all of the circumstances, the District Court acted within its discretion when it determined that "the citizens of the State are best served by a prompt resolution of the issues framed by the pleadings as to the constitutionality of their new state constitutional provision, and the delay in reaching that objective occasioned by the tardy requests to intervene, . . . renders the requests (save Russell's) untimely." App. B-12. Regardless of whether Petitioners possessed a substantial legal interest in the subject matter of the action, their motions were untimely and therefore properly denied in the discretion of the District Court.

2. Petitioners' Motions to Intervene Were Properly Denied Based on a Finding that Their Interests Were Adequately Represented

The District Court also found that Petitioners' interests were adequately represented by Michigan's Attorney General. This finding provided a sufficient basis for the District Court to deny Petitioners' motion to intervene of right. Thus, even if Petitioners could prove a substantial legal interest in the action, they would not succeed in establishing their right to intervene.

Petitioners wish to characterize the District Court's decision as promoting a broad, sweeping rule that public officials such as a state's attorney general are always presumed to act in the interests of the citizenry. This is not the case. Rather, the District Court made a factual finding that Petitioners were adequately represented by the Attorney General, based on the information before the court in an expedited setting. App. B-16-18.

The District Court made a number of important factual findings with respect to this issue. For example, the District Court found that the "Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage." App. B-17.[5] And the District Court observed that the Attorney

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[5] Respondent Universities accordingly disagree with statements by Petitioners classifying Michigan's Attorney General as a mere "political opponent of the new law." Petitioner's Brief at 27.

General's office had "taken pains to divide its sections representing the Governor and its own interests and has isolated the two divisions." *Id.* In essence, the District Court found that the interests of Petitioners and the interests defended by the Attorney General were one and the same: both supported Proposal 2 and sought to defend its constitutionality. Those factual findings should stand absent clear error.

Arguments now put forward by Petitioners that their interests diverged from those of the Attorney General because they would have made different decisions are not only self-serving, but they defy the factual findings of the District Court. Mere disagreements as to strategy do not equate to a divergence of interests or, ultimately, the inadequacy of representation. *See, e.g., Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *United States v. City of Miami*, 278 F.3d 1174, 1178-79 (11th Cir. 2002); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Moosehead San. Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979).

Indeed, the subsequent history of litigation between the parties only confirms the District Court's factual findings. Since Petitioners' motions for intervention were denied, the Attorney General has fought, and prevailed, on the issue of the Proposal's constitutionality. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d 924, 944-60 (E.D. Mich. 2008) (granting Attorney General's motion for summary judgment and dismissing constitutional claims by Plaintiffs).

In fact, when MCRIC and ACRF filed their Petition for a Writ of Certiorari on March 14, 2008, the District Court had not yet issued its comprehensive dismissal of Plaintiffs' claims. The District Court's March 18, 2008 granting of the Attorney General's dispositive motion significantly undercuts Petitioners' claim that they lack proper representation. Should this Court ultimately allow Petitioners to intervene, the adequacy of their representation will not improve, and neither will the dockets of the federal courts below.

CONCLUSION

For the foregoing reasons, Respondent Universities respectfully request that this Court deny the petition for writ of certiorari.

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Respectfully Submitted,

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